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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

BRAINARD H. WARNER ET AL.,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
No. ~~388~~. 89.

H. MAURICE TALBOTT AND FRANK I. WOOD,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
No. ~~389~~. 90.

BRIEF FOR APPELLEES.

J. J. DARLINGTON,
Solicitor.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

BRAINARD H. WARNER ET AL.,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
} No. 358.

H. MAURICE TALBOTT AND FRANK I. WOOD,
Appellants,
vs.
DAVID C. GRAYSON, TRUSTEE, ET AL.,
Appellees.
} No. 359.

BRIEF FOR APPELLEES.

The above are appeals from a decree rendered by the Supreme Court of the District of Columbia in the case of David C. Grayson, Trustee, et al., *vs.* Frank I. Wood et al., and affirmed by the Court of Appeals of the District of Columbia. The appeal in No. 358 is on behalf of the parties secured by a first deed of trust on the Victoria apartment house from so much of the decree of the Court of Appeals as denies to them certain easements in and over a 10-foot strip of ground on the south and west sides of the apartment house, allowed them by the

decree of the Supreme Court of the District of Columbia; while the appeal in No. 359 is by the owners of the apartment house, or of the equity of redemption therein, from the decree below, affirmed by the Court of Appeals, allowing those easements to the parties secured by a second deed of trust upon the apartment house property.

Statement of Facts.

On or about January 13, 1897, Mrs. Alice S. Hill conveyed to Nicholas T. Haller the whole of lots 1 and 2, in block 45, Hill's subdivision, University Park, a diagram of which lots is exhibited at page 12 of the record. Mr. Haller thereupon entered upon the erection of an apartment house, known as the Victoria Flats, on the portion of said lots embracing the north 120 feet front thereof by a depth of 124 feet, making for the purpose a building loan of $75,000, secured upon the said described parts of said lots by a deed of trust to Brainard H. Warner and Louis D. Wine. He simultaneously executed a deed of trust to the defendants McReynolds and Meriwether upon the remaining portions of lots 1 and 2 to secure his promissory notes, aggregating $12,315, held at the time this suit was instituted by Mrs. Alice S. Hill, Charles M. Carter, and, as collateral, by the First National Bank of Gaithersburg. For convenience, the encumbrance securing the $75,000 building loan will be referred to as the Warner trust, while the encumbrance upon the portions of the two lots not covered by the Warner trust will be designated as the McReynolds trust.

During the progress of the apartment house, Mr. Haller became further indebted in the sum of $30,087.65 to various material men and mechanics, and in the sum of $10,350, borrowed money. To relieve the property of this indebtedness, a second deed of trust upon the above-described portion of the two lots covered by the Warner trust was executed to David C. Grayson and John C. Heald, the

material men very generously consenting to admit into this second trust upon an equality with themselves the $10,000 of borrowed money, which, under the law, would have been subordinated to their liens. This second trust will be referred to, for purposes of convenience, as the Grayson trust.

The design or plan for the apartment house contemplated its erection 20 feet west of the Fourteenth street line and 10 feet south of the line of Welling Place, giving a margin of 10 feet at the narrowest point between the south and west walls of the building and the lines of the Warner and Grayson trusts for projections, ventilation, and light. When the erection was begun, however, an adjacent owner claimed the existence of a building restriction, reserving from improvement 40 feet of the lot abutting on Fourteenth street and 20 feet on Welling Place, and threatened an injunction suit if this alleged building restriction were not observed (Rec. p. 47).

The answers aver that there was no such valid building restriction, but that Mr. Haller, on being informed that it did exist, and without investigating the fact, set his building back accordingly (Rec. p. 17). The result is that the walls of the building encroach, as the defendants claim in their answers, upon the ground covered by the McReynolds trust, the porches on the south and west sides extend over the McReynolds property to the extent of 4 feet 9 inches (Rec. p. 51), while the areaways, as alleged in the bill and not denied in the answers, in like manner encroach 5 feet. In addition, there are 36 windows in the west wall, 19 windows in the south wall, 22 doors in the west wall, 5 doors in the south wall, 4 cellar windows in the west wall, and 4 cellar windows in the south wall, leading out to the porches, the building thus depending wholly for light and air and for communication with its interior from the south and west basements, and from its apartments, upon the

contiguous portions of the ground covered by the McReynolds trust (Rec. p. 51). To close these windows and doors, and to remove these porches and areas would be disastrous to the property, would deprive a number of the apartments of light and air, would render those on the south and west sides practically unavailable, and would largely cut off or interfere with the salability of the property, or the deriving of an income therefrom (Rec. pp. 48–9). There is a recess in the front and in the rear of the building, described in the opposing brief as "the usual recesses;" but, notwithstanding these, Mr. Robert I. Fleming testifies, at page 125 of the record, that the construction of adjacent buildings on the south and west "would really ruin the building;" that the recess on the south affords very little relief (Rec. p. 126), and that if buildings were erected 10 feet away it would help very much, but that it would still damage the flats to some degree (Rec. p. 127); while Mr. James G. Hill, at page 130, states that the recesses would benefit two rooms in the front and two in the rear of the building. The answer, at page 19, of Wood, adopted by his co-defendant Talbott, admits that "the said property, owing to its improvident plan of construction, was dependent for certain of its light and air upon the adjoining property." At page 17, it avers that this location was unintentional, and that "said Haller intended to erect the said building well within the lines of the conveyance to Warner and Wine," and that "in the erection of a building of this character due allowance is and should always be made for the maintenance of side windows, irrespective of the bare contingency of the continued vacancy of the adjoining ground, owned by other parties, and further shows that while said windows may be necessary for the most convenient use of the building as now constructed, yet nevertheless he is advised and therefore avers that if said building were remodeled to conform to a

proper plan such as should have originally been adopted, that then and in that case said windows would no longer be such a necessity to the proper and successful use of the said building as is averred in the bill." At page 96, the defendant Wood on cross-examination admits that, if the land surrounding the Victoria Flats building were built upon, close up to the flats, they would be deprived of light and air. At pages 76–77, Mr. Talbott admits sufficiently, though evasively, that it could not be conducted successfully without an adjacent 10-foot strip, while at page 109 Wood testifies that both he and Talbott knew additional ground was a necessity for the flats, and that they accordingly procured it in the manner hereinafter shown.

In other words, the answers admit, and the proof shows, that the changed location and the consequent encroachment upon the adjacent or McReynolds lots for necessary projections, light, and air will result in the ruin of the property, and the consequent destruction of the security intended to be afforded the complainants by the encumbrance securing their notes, if the Victoria Flats is to be deprived of the ground actually added to or appropriated for the flats by Mr. Haller, at a time when he was the owner of both the tracts in question, as hereinafter shown.

With regard to the holders of the promissory notes secured by the Warner trust, which trust was given before the building was commenced, the plan at that time contemplated a margin of 10 feet at the narrowest point on the south and west sides within the lines of the Warner deed of trust. With respect to the holders of the Grayson trust notes, the proof shows that these were accepted by the material men and mechanics without the slightest intimation or suspicion upon their part that their trust deed did not fully comprise the entire Victoria Flats building (Rec. pp. 35, 50), but, on the contrary, with

the understanding upon their part that there was 10 feet of ground laid outside the building for an air space (Rec. p. 41). The defendant Wood in his answer claims, it is true, that the complainants were aware of the improper location of the building at the time they accepted the security of the second deed of trust, but at page 110, he admits that this claim of the answer is without foundation.

About April 9, 1898, the defendant Wood exchanged an alleged equity in certain lots in square numbered 226 for an undivided one-half interest in the Victoria Flats property (Rec. pp. 52–3), in connection with which transaction Mr. Haller included a 10-foot strip on the south and west sides of the building, the conveyance being made to the defendant Bernard A. Duke, who gave a contemporaneous written declaration that he held it "in trust for N. T. Haller and Frank Ivey Wood, one-half interest each" (Rec. p. 93). Contemporaneously with this transaction, namely, on April 5, 1898, a written agreement was entered into between Haller and Wood to the effect that a stock company should be organized for the purpose of owning and conducting the Victoria Flats, to which they would convey the property, including the 10-foot strip, the capital stock to be divided between them according to the terms specified in an agreement, which is set forth at pages 100–1 of the record. It is thus apparent that Mr. Haller, the party primarily responsible for the erection of the building in the manner out of which the present controversy grows, at a time when he was the owner of both the Warner and the McReynolds tracts, intended, and endeavored, to rectify the irregularity by uniting with the Warner property an adjacent 10-foot strip of the McReynolds property, thus affording substantially the same provision for projections, air and light, as were contemplated by the original application upon which the Warner trust

was based, and which was supposed to have been carried out at the time the Grayson trust was executed.

Also, contemporaneously with this transaction, an agreement was entered into that $4,000 of the McReynolds encumbrance should be paid, and that the 10-foot strip should thereupon be released from the McReynolds deed of trust. The $4,000 was raised by borrowing that sum from the Bank of Gaithersburg upon the security of $4,000 of the McReynolds notes as collateral, which loan not having as yet been paid to the bank, the release has not been obtained. The claim, insisted upon by the defendants throughout the testimony until complainants had succeeded in obtaining written evidence to the contrary, that this privilege of securing a release of the 10-foot strip expired on March 10, 1898, was conceded to be unfounded when the written evidence was secured (Rec. pp. 118–24).

The opposing brief states as a fact, at page 4, that the equity given by Wood for his half interest in the Victoria Flats was "valued at $20,000," and that it "netted Haller $20,000 in a subsequent trade." The only foundation for this statement is the admittedly hearsay and incompetent testimony by Wood that Haller told him he had valued the equity at $20,000 in a subsequent exchange of properties. The fact is that the Wood equity in question was subject to two prior trusts, aggregating $20,000, under the second of which it was sold, barely clearing that, and leaving no surplus at all (Rec. pp. 62–3), so that in fact the consideration given was without any actual value.

Subsequently, on or about the 1st day of April, 1899, Talbott purchased Haller's remaining half interest in the Victoria Flats property, and also a half interest in the McReynolds property, paying therefor in money and notes $3,100. He states that in this transaction he regarded the Victoria Flats as the really valuable

property, and the chief consideration for his purchase (Rec. p. 27). What the value of the McReynolds equity was at that time supposed to be is shown by the fact that, contemporaneously, Wood purchased Haller's remaining one-half interest in that equity for the sum of $250 (Rec. p. 98).

The Grayson trust, as will be seen by reference to page 116 of the record, contains a provision that the trustees under it should collect the rents and profits of the building over and above the amount necessary to pay the interest on the first trust, the taxes, insurance, ordinary repairs, and the running expenses, and apply the same toward the payment of the Grayson trust notes. Pursuant to this provision, and by general consent of the creditors (Rec. p. 35), the firm of B. H. Warner & Co. collected the rents of the building, which were sufficient to pay all the charges enumerated, including the interest on the second trust notes (Rec. pp. 35–36), until May, 1899, when the defendants Wood and Talbott proposed to Mr. Heald, one of the trustees, that the commissions of B. H. Warner & Co. could be saved by allowing Wood to collect the rents, upon which representation Messrs. Grayson and Heald assented to the change (Rec. pp. 44, 35–36).

In the opposing brief, at page 5, it is asserted that Wood successfully conducted the flats for a time, but found it would be impossible to meet the exorbitant interest charges from the revenue. The complainants, on the contrary, charge in effect that Wood and Talbott first endeavored to purchase the second trust notes at a heavy discount; that, failing in this, they threatened that the holders of those notes should get nothing if they could prevent it; that they thereupon made default in the very first instalment of interest upon the Warner trust falling due after Wood had undertaken the management of the property under the circumstances above set forth, and ap-

parently for the very purpose of bringing about a default and consequent foreclosure sale; that they made no effort to obtain any extension of time, or to effect any arrangement to prevent foreclosure; that, on the contrary, when the complainant Grayson urged them to prevent it, offering himself to advance the deficiency if the rents in their hands were insufficient to pay the interest in arrears, they declined to do so, having formed the project of becoming themselves purchasers at the foreclosure sale, and thus cutting out the second trust note holders; and that they actually went so far in pursuance of this scheme, for the purpose of repelling competition at the sale, as, only four days before the date fixed for it, to have Wood file a bill against the defendant Duke, set out at page 13 of the record, representing to the court that Duke was the owner of the Victoria Flats property; that Wood was the owner of the property described herein as the McReynolds property; that the Victoria Flats property was pierced with a large number of windows on its southern and western sides; that it had a large number of porches extending its whole depth and width, projecting about 6 feet from its walls; that its eaves projected beyond its southern and western walls, throwing water and melted snow upon Wood's land; that areaways had been excavated extending on an average 2 feet into the land of Wood; that none of these constructions were made with the consent or permission of Wood; that they seriously injured his land, greatly diminished its value, and constituted nuisances injurious to his property, the continuance of which he was entitled to prevent, and praying for a mandatory injunction to close the windows and to remove the porches, projecting eaves, areaways, etc., the bill being verified by Wood's oath

The defendants denied having formed any such scheme, which the answer of Talbott denounced as a "nefarious" one. The Court of Appeals, when this case was before it

on an interlocutory appeal from the order below appointing receivers, in an opinion which seems to be omitted from the record, but which is reported in 16 D. C. App. 174, declares the scheme, if true, one which "it would be superfluous to characterize with an epithet." Both courts below found the complainants' averments to have been established by the proof, and it only remains to see whether their findings in this respect are sustained by the evidence.

In the first place, as above noted, the undisputed evidence shows that, under the management of B. H. Warner & Co., the flats, after paying all prior interest charges, taxes, insurance, operating and other expenses, left a surplus sufficient to pay the interest upon the second trust notes. The defendants, as shown by the testimony of Mr. Heald, contrary to the denial of their answer (Rec. pp. 19, 20), obtained the consent of the trustees to take the property out of the hands of Warner & Co. upon the representation that they could thereby economize to the extent of the agents' commissions, whereupon the following occurrences took place:

1. Notwithstanding the denial of the answers, at pages 22 and 23, that any attempt was made to purchase the second trust notes "at a heavy discount, or any discount whatever," the testimony shows that both Wood and Talbot sought a discount of Grayson, obtained his agreement to accept nearly $1,000 less than the principal of his claim, besides the interest, which offer appears not to have been satisfactory to them; that Wood then went to McClure for a like purpose, stating to him that "there was one or two that he would like to see get their money, but that there were others, and that Grayson was one, who, if he could prevent it, would not get a dollar" (Rec. pp. 40, 43); and that a man introducing himself as Wood called upon Mr. George C. Esher, offering only 20 cents on the dollar for his notes, and stating that, if this

was not accepted, he would see that Esher should lose it all (Rec. pp. 50–1). It is true that, called upon to identify the man who thus called upon him, both Duke and Wood being present, Esher pointed out the former, whereupon Wood denied that he had ever seen Esher upon the subject; no explanation, however, being offered of the fact, undenied, that the call was made and the language in question employed by a man professing to be Wood, Duke being, as is entirely apparent throughout the record, employed by Wood merely as his figurehead and tool.

It was claimed by Wood and Talbott, and is asserted in the opposing brief at page 5, that an effort to place a new loan of $100,000 at a low rate of interest, and thus effect a settlement of the claims against the Victoria Flats property, was defeated by Grayson. The fact is, however, as testified to by the defendants themselves, that Grayson did offer to abate nearly $1,000 of his claim; and, though refusing to enter into any written proposition to continue that offered reduction for an indefinite time, that he terminated the interview by asking them to call upon him again whenever they were willing to pay him $5,000 for his claim of nearly $6,000 (Rec. p. 29), and, further, that the new loan of $100,000 failed and was abandoned, not on account of any act of Grayson, but because the agent who had undertaken to negotiate it at the reduced rate informed the appellants that he could not accomplish it (Rec. p. 30).

The denial by Wood of the threats attributed to him by the witnesses, against the holders of the second trust notes who would not agree to discount their notes in the manner desired, is so modified by him on his cross-examination, at pages 101–2, as virtually to amount to a confession of them.

2. The plan of getting rid of the second trust note holders by discounting their claims having failed, the next step in the programme was the obtaining by Wood

from Duke of a deed to the 10-foot strip which Haller had united to the Flats, and which both Wood and Talbott, as above pointed out, admit was essential to their successful existence. No possible cause or reason is pretended by the appellees for thus attempting to deprive the Flats of this concededly necessary 10-foot strip, other than that charged by the complainants, namely, to place the Flats property in such a state that it could not be disposed of to any advantage at a foreclosure sale, enabling Wood and Talbott either to buy it at such a sale without competition, or else to dominate its value in the hands of any other purchaser.

3. The next occurrence was default in payment of the interest due under the Warner trust. The brief below attributed this default to the "exorbitant interest rate which the encumbrances bore;" but no attempt was made to explain the fact, that under the management of B. H. Warner & Co., before Wood assumed the management of the property, all the charges, including the interest on the second trust notes, had been paid; nor the further fact that, after the receivers were appointed, the property again paid all charges, including the arrearages, together with several instalments of interest upon the second trust notes (Rec. pp. 40, 104). As above stated, the transfer of the management of the property from Warner & Co. to Wood, following the separation of the 10-foot strip from the Flats, and the default in the next ensuing instalment of interest under the first encumbrance, were plainly but parts of a common, connected whole.

4. Upon learning of this default, only through the foreclosure advertisement, Mr. Grayson, the active trustee under the second trust, addressed two written communications to Mr. Wood, dated, respectively, August 22, 1899, and August 25, 1899, offering to advance the deficiency if the funds in Wood's hands were inadequate to the

payment of the interest, following up these written communications by two personal interviews, making the same proposition. He inquired of Wood whether he had asked for indulgence, or offered to pay the money which he had on hand, to which he replied that he had not. Grayson then offered to advance any money necessary to complete the interest payment, to which Wood replied that he would see Talbott and let Grayson know (Rec. p. 37). At the second interview, Wood refused absolutely to turn over the money in his hands for the purpose of aiding in the payment of the interest and thus stopping the sale, alleging, as his only reason, that he was acting "by advice of counsel" (Rec. p. 103).

Talbott came in before the interview was over, and inquired of Grayson what he would do with the money in case it was turned over to him and Mr. Warner refused to receive it, which inquiry, he claims, Grayson declined to answer. This alleged failure of Grayson to respond to the inquiry concerning the contingency proposed by Talbott was ingeniously put forward in the opposing brief and argument below as the reason why Wood and Talbott refused to consent to Grayson's proposal. The fact, however, is that Wood had refused, as he stated by the advice of counsel, before Talbott came in and made his suggestion ; that the refusal to turn the money over to Grayson for the purpose indicated was not based upon any intimation of a doubt whether the latter would fulfill his promise to make good any deficiency (Rec. p. 103); that, although there was a telephone in the Flats building, where the interview took place, no effort was made to call up Mr. Warner and inquire whether he would refuse the interest, nor was any effort made to see whether Warner would accept it (Rec. pp. 104–5); and the refusal was persisted in notwithstanding the undisputed fact that Grayson offered to go with them, and, if they would pay their part, make up the balance (Rec.

p. 38). Wood admits he had no reason to suppose that Warner would refuse to receive the interest; that he made no effort to ascertain whether he would or not; that he tried in no way to prevent the sale (Rec. p. 59), and had no desire to prevent it (Rec. p. 104). And see practically to the same effect, Talbott, at pp. 78-9.

The statements, at page 6 of the opposing brief, that the advice of Wood's counsel was not to pay over any money "unless assured it would be accepted and duly credited, and the threatened sale averted," and that "such an assurance could not be obtained," are to be found in the brief, only, and are wholly unknown to the record.

5. The next step in the matter was the filing of the pretended suit in equity by Wood against Duke, set forth at page 13 of the record. Duke, at pages 45–7, testifies that he merely held the title as trustee; that he never claimed any interest; that he never knew of any proposition to close the windows until the suit was brought against him, except that Wood had said they ought to be closed; that he, Duke, never had charge of the Victoria Flats, and never interfered in any way with their conduct or management, and that Wood did not ask him to do anything about closing the windows.

Wood, at pages 105–8, admits that Duke had no beneficial interest, and that he, Wood, made no attempt to close the windows or doors. He refuses to answer the question whether he really wished the relief granted which was prayed in his bill, evades answering the question whether the sole object of the bill was not to frighten away people who might have been willing to bid for the property at the foreclosure sale, and finally endeavors to put the entire responsibility for that remarkable proceeding upon counsel—an effort which, rather strangely, appears to be seconded in the opposing

brief. Mr. Talbott, however, testifies that the scheme was one proposed by Wood, to which he, Talbott, at first objected, but in which he finally acquiesced, as a means of informing possible buyers, by the record, of "the rights" that Wood and Talbott had (Rec. pp. 69, 79). And see the cross-examination of Wood upon this subject, by his own counsel, at pages 56 and 57.

6. That Wood and Talbott intended, themselves, to become the purchasers at this foreclosure sale, from which competing bidders were to be repelled in the manner above indicated, though not in terms admitted, is entirely apparent from the testimony of Wood, that, pending the advertisement, he took steps to avoid the placing of any sale signs upon the property, in order to prevent loss of the tenants (Rec. p. 109), and from the testimony of Mr. Talbott, at page 78, that either before the foreclosure advertisement went in, or while it was being published, he called upon Warner & Co., to arrange for replacing the first trust upon the property, after it had been made to serve the purpose of cutting out, by sale, the holders of the Grayson trust notes.

The opposing brief treats the case as though it raises simply the question as to the right to an implied easement for light and air. As shown in paragraph 4 of Wood's answer, adopted by Talbott, the south and west walls of the building are in part located over and upon the ten-foot strip, and as alleged in paragraph 11 of the bill and admitted in paragraph 11 of the answer, Wood and Talbott deny the right to use the portion of the strip on which the walls rest. Porches on each floor of the building, on its west and south sides, extend from five to six feet over the strip, and communicate with the building only by doors opening out upon them. As shown by the stipulation at pages 162–3 of the record, areaways, doorways, garbage chutes, and cellar doors for reception of the coal supply for the building are located upon, into,

and over the cement walks forming a part of the ten-foot strip, and are not otherwise accessible or capable of being reached or used. These were all completed at the time of the Grayson trust, and it is self-evident that, if now withdrawn and their use denied, the result will be to depreciate and destroy irretrievably the value of the building, and the security intended to be afforded by the trust.

The Equities.

An attempt was made below to distinguish the present case from an earlier one in the local courts, that of Manogue *vs.* Bryant, 15 D. C. App. 245, on the ground that, in that case, the failure to include the entire premises in the deed of trust was the result of mutual mistake between the granfor and the grantee, while, in the case at bar, Mr. Haller did not intend to include the 10-foot strip in either the Warner or the Grayson trust. We submit this attempted distinction is untenable, for two reasons, namely: First, there is no evidence to support the existence of any such distinction in fact between the two cases; and, secondly, such a distinction, if it existed, would affect no principle.

In the first place, the record shows that Haller did honestly attempt to annex the 10-foot strip to the Flats property, and thus relieve it of its dependence upon the McReynolds property. He did this, first, by his deed to Duke of the Flats property, including the strip; secondly, by his arrangement with McReynolds, to which Wood was a party (see Complainant's Exhibit Receipt, Rec. p. 119), to secure a release of the 10-foot strip from the McReynolds deed of trust, and, thirdly, by the contract with Wood of April 5, 1898, under which the Flats and the strip, as one entire property, were to be conveyed and held together by a stock company. All three of these transactions, as Wood admits, were contemporaneous with the acquisition of his interest (Rec. p. 120).

In the second place, if the distinction contended for existed, it would affect no principle. The original building plans contemplated a building which should set back 20 feet from Fourteenth street, and 10 feet from Welling Place, thus leaving a 20-foot strip on the western exposure and a 10-foot strip on the southern exposure of the building. On being notified of the building restriction claimed to exist, Haller set the building back 40 feet from Fourteenth street and 20 feet from Welling Place, giving no notice of this fact to the Warner and Wine note holders, and leaving the mechanics and material men, as the testimony shows, still to suppose that there was a 10-foot strip on the west and south sides. The effect of the distinction insisted upon is that, if he had intended to be honest with these parties, and had omitted this strip from the deed of trust by mistake, the case would be ruled by that of Manogue *vs.* Bryant; but that if he allowed them to take the deed of trust supposing that they were getting the 10-foot strip, while he himself knew they were not, the rule would be different. To state this proposition would seem, in a court of equity, conclusively to refute it.

If, then, this suit were by the note holders against Haller, no authority would need to be cited other than the case of Manogue *vs.* Bryant, assuming that case to have been correctly decided, and the only question would be whether, under the facts and circumstances disclosed by the evidence, Wood and Talbott, Haller's grantees, stand in any better position than he himself would do, if his conveyance to them had not been made. This question, of course, is simply the question whether they are, or can claim to be, innocent purchasers without notice.

Upon this question, before discussing it as a matter of law, the following testimony, given by the appellants themselves, is to be noted:

1. As above shown, the answer of Wood, adopted by Talbott, admits, at page 17 of the record, that due allowance generally is, and should always be, made for light and air, irrespective of the contingency of a continued vacancy of adjoining ground owned by other parties, and that, as the building was constructed at the time of their purchase, the windows were a necessity to the proper and successful use of the building, and, at page 19, that the location of the building was an "improvident" one. These admissions in the answers are fully confirmed by the testimony at pages 94 to 97, notwithstanding its disingenuous and evasive character. Mr. Talbott, at page 82, testifies that before his purchase he commented upon—

> "how foolish a man was to build on the ground a house of that kind, and then put a trust upon the surrounding land,"

and that he was then informed by Haller that he had—

> "taken care of that by getting an agreement from Meriwether and McReynolds to release 10 feet of that surrounding land;"

and again, at page 90, he declares—

> "I do not mean for one moment to say that I do not known that the closing of the south and west windows would not affect the hotel,"

evasively adding, "but how much I do not know." At page 73 he testifies that, before his purchase, he knew that the 10-foot strip had been taken from the McReynolds tract and added to the Victoria Flats by Haller's deed to Duke. At pages 68, 70, 71, 72, 74, 82, 86, and 88 he testifies that he had been told by Wood, Haller, and Duke, or by all of them, about the contemplated release of the 10-foot strip, before his purchase; at pages 75–6, that he knew he was bound to follow up such a notice, and, at page 87, that he thought of the note holders in this connection, but that he did not confer with

any of them. Mr. Talbott further testifies that knowing these facts, and realizing that the value of the McReynolds land *was largely increased* by the erection of the Flats in such manner as to be dependent upon that land for light and air (Rec. p. 75), and although he knew the placing of the building in its disadvantageous position was done by Mr. Haller after he had negotiated his loan with Warner & Co.; and that he had then given this building, so situated, to the Grayson note holders as their security when he was the owner of all the ground (Rec. p. 91), he nevertheless made his purchase upon the "process of reasoning" (Rec. p. 83) that he and Wood could try to make money out of the Victoria Flats, and, if they failed in that, they could then drop the Flats and make their money out of the adjoining ground, as they "were under no legal or moral obligation to see that the trust notes were paid" (Rec. pp. 74, 83, 89), and had "nothing to do with the moral aspect of Haller's dealings" with the Grayson and Heald people (Rec. p. 91).

It is impossible upon such a record, we respectfully submit, seriously to contend that Wood and Talbott stand in a better position than Mr. Haller would do if he were still the owner of the equities in the two properties.

Points and Authorities.

As above indicated, the case of Manogue *vs.* Bryant, 15 D. C. App. 245, is believed to be entirely in line with the facts of the present case in every respect, and rules it. That case, also, at page 256, answers the contention on behalf of the appellants that the appellees were negligent in not having a survey or measurement made, in order to ascertain whether the building as erected was within the lines of the trust deed.

The case of Frizzell *vs.* Murphy, 19 D. C. App. 440, 446,

is also identical in effect, holding it well settled, both upon principle and authority, that where the owner of both a quasi-dominant and a quasi-servient tenement conveys the former, retaining the latter, all such continuous and apparent quasi-easements as are reasonably necessary to the enjoyment of the property pass to the grantee, giving rise to an easement by implied grant. At the date of the Grayson trust, Haller, owning both the quasi-dominant and the quasi-servient tenement, conveyed the former and retained the latter.

The case of Janes *vs.* Jenkins, 34 Md. 1, is also precisely in point and to the like effect; and, although the Supreme Court of Massachusetts, in Keats *vs.* Hugo, 115 Mass. 204, 216, cited by appellants, in an opinion by Mr. Justice Gray, questions the authority of Janes *vs.* Jenkins, that learned justice later concurred in the opinion in Shepherd *vs.* Pepper, 133 U. S. 626, 650, asserting the same doctrine as Janes *vs.* Jenkins.

In this case of Shepherd *vs.* Pepper, the applicability of which to the present case is questioned in the opposing brief upon grounds not stated with sufficient clearness to be entirely intelligible, the mortgagor was not the owner of the additional ground at the time of the mortgage, though his improvement encroached upon it. Later, he gave a third trust to secure his promissory note to C, after he had acquired the quasi-servient tenement, so that, in fact, C's mortgage was the only encumbrance of record upon the additional ground. The court held that C took subject to the prior mortgages, not only upon the ground that, in the preliminary negotiation, C was informed that the loan would be secured by a second mortgage, but upon the wholly distinct and independent ground that the prior mortgages described the premises—

> "together with all the improvements, ways, easements, rights, privileges, and appurtenances, to

> the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to, or out of the said piece or parcel of land and premises."

The court say, at page 650:

> "The improvements and easements in question were visibly necessary for the dwelling house as then constructed, and were visibly upon, or required the use of, sublot A."

It is true that, in Shepherd *vs.* Pepper, Mrs. Gray was only a mortgagee, and not the grantee in fee of sublot A; but a grantee who obtains his deed, not merely with constructive, but with actual knowledge, full and complete in all respects, of the exact situation, and who takes it upon the avowed "process of reasoning" that, in his hands, the premises will not be subject to the legal and moral obligations of his grantor, it can not be contended stands upon a better footing than a mortgagee, or can claim to be considered an innocent purchaser without notice.

The language of the deed of trust in Shepherd *vs.* Pepper, above quoted, is practically identical with that of the Grayson deed of trust (Rec. p. 116), and is the same in substance with that in Janes *vs.* Jenkins.

In view of the foregoing decisions, establishing the law in this jurisdiction, it would seem hardly necessary to follow counsel in their discussion of the somewhat conflicting state of the authorities in other jurisdictions. That conflict, however, is by no means so one-sided as the appellants' examination of the authorities seems to have led them to conclude.

At pages 22–25, it is represented that Janes *vs.* Jenkins, 34 Md., 1; Sutphen *vs.* Thelkerson, 38 N. J. Eq.,

318, and Greer *vs.* Van Meter, 54 N. J. Eq. 33, are the only American cases holding that there can be an implied grant of easements, or, at least, of easements of light and air, over and retained by the grantor upon severance by him of the estate If confined to easements of light and air, this contention could be admitted without affecting the decision in this case. As is shown *supra*, the easements here contended for are not confined to easements of light and air, but embrace others of almost, if not quite, equal importance, and which were indicated by visible, tangible, structural conditions, as above pointed out.

As the assignments of error do not contest the correctness of the decree below in its allowance of an easement over the 10-foot strip for the purposes of the porticoes and other projections, and the approaches to the entrances along the south and west sides of the building, the allowance of these easements is not in controversy upon this appeal.

Upon the principle of construction that, where a man grants a thing, he grants with it everything necessary to its enjoyment, a grant by the owner of a tenement will pass to the grantee all those continuous and apparent quasi-easements which are necessary to the reasonable enjoyment of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted, these being regarded as easements appurtenant to the land granted. 14 Cyc. 1166. In order that such an easement may pass by implication, it must be annexed to the estate granted, must be reasonably necessary for the beneficial enjoyment of the same, and must be in open, apparent, and continuous use at the time of the grant (14 Cyc. 1168; Durkee *vs.* R. R. Co., 24 N. H. 489), all of which conditions concur in the case at bar.

Open, visible ditches (14 Cyc. 1169, 1172, et seq.; Thayer *vs.* Payne, 2 Cush. 327; McElroy *vs.* McLeary, 71 Vt. 396; Stuyvesant *vs.* Early, 58 N. Y. App. Div. 242; Sanderlin *vs.* Baxter, 76 Va. 299; Quinlan *vs.* Noble, 75 Cal. 250); a furnace flue (Ingalls *vs.* Plamondon et al., 75 Ill. 118); an alley way (Cihak *vs.* Klekr et al., 117 Ill. 643; Burns et al. *vs.* Gallagher et al., 62 Md. 462); a water ditch and water rights (Cave *vs.* Crafts, 53 Cal., 135); rights of way (Ellis *vs.* Bassett, 128 Ind., 118; McTavish *vs.* Carroll, 7 Md. 352); stairways in a building (Galloway *vs.* Bonesteel, 65 Wisc. 79; Geible *vs.* Smith, 146 Pa. St. 276); a flow of water forced from vendor's premises, through pipes, to the premises of the vendee (Toothe *vs.* Bryce, 50 N. J. Eq. 589); a portion of a building projecting upon the land retained by the vendor (R. R. Co. *vs.* Needham, 61 N. Y. Supp. 992), have all been held to be subjects of implied easements.

Nor, according to the weight of authority, is a strict or indispensable necessity the condition of such implication; it is sufficient if the necessity be such as to render the easement necessary for the convenient and comfortable enjoyment of the property, and as it existed before the severance was made. 14 Cyc. 1171. In Ingalls *vs.* Plamondon, *supra*, reasonable necessity is held to be the proper rule; in Cihak *vs.* Klekr, *supra*, that the easements shall be "highly convenient and beneficial"; in Mitchell *vs.* Seipel, 53 Md. 264, and in Eliason *vs.* Grove, 85 Md. 226, that it shall be "reasonably necessary"; in Ins. Co. *vs.* Patterson, 103 Ind. 582; Irvine *vs.* McCrary, 108 Ky. 495, 500; R. R. Co. *vs.* Gayton, 93 N. W. Rep. 163; and Greer *vs.* Van Meter, 54 N. J. Eq. 270, that it shall be "necessary to the beneficial enjoyment of the premises granted," and in Havens *vs.* Klein, 51 How. Pr. 82, that it shall be "necessary to the enjoyment, and clearly intended from the circumstances

existing at the time when the conveyance was made."

Light and air are, under proper circumstances, proper subjects of implied easements.

Morrison *vs.* King, 62 Ill. 30.
Cherry *vs.* Stein, 11 Md. 1, 24.
Janes *vs.* Jenkins, 34 Md. 1.
Story *vs.* Odin, 12 Mass. 157, 160.
Ins. Co. *vs.* Patterson, 103 Ind. 582.
Greer *vs.* Van Meter, 54 N. J. Eq. 270.
Irvine *vs.* McCrary, 108 Ky. 495.

And see a review of the authorities upon this subject in—

Lampman *vs.* Milks, 21 N. Y. 505, 511, et seq.

An implied grant of an easement of light will be sustained in cases of real necessity, though denied when it appears that the claimant may, at a reasonable cost, substitute other lights for his building.

Turner *vs.* Thompson, 53 Ga. 273.
Rennyson's Appeal, 94 Pa. St. 147, 152–3.

> "There is no occasion to question the doctrine laid down in Washburn on Easements, Chap. IV, Sec. 6, p. 26, that, 'if one sell a house, the light necessary for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant land would pass as incident to the dwelling house, because necessary to the enjoyment thereof.'"
>
> White *vs.* Bradley, 66 Me. 254, 263.

Where necessary to the enjoyment, and clearly intended from the circumstances existing at the time the conveyance was made, an easement for light and air will pass by implication (Havens *vs.* Klein, 51 How. Pr. 82; Speis *vs.* Damm, 54 How. Pr. 293; O'Neil *vs.* Breese, 23 N. Y.

Supp. 526). As pointed out in the opinion of the court below, at p. 152 of the record, the same rule is adopted in United States *vs.* Appleton, 1 Sum. 492, the opinion in which case was rendered by Mr. Justice Story. See, also—

Maynard *vs.* Esher, 17 Pa. St. 222.
Dill *vs.* Board of Education, 47 N. J. Eq. 421.
Powell vs. Sims, 5 W. Va. 1.
Holloway *vs.* Southmayd, 139 N. Y. 390.

With regard to the Connecticut authorities cited in the opposing brief, to the effect that no inplied grant of an easement in light and air will be sustained, implied grants of land, or of easements, or of any interest in land, are declared to be allowable in that State, when allowable at all, "to a very much more limited degree than in other States."

Whiting *vs.* Gaylord, 66 Conn. 337, 349.

In Morrison *vs.* Marquardt, 24 Iowa, 35, cited in the opposing brief, the court, denying the implication of an easement of light and air in the case before it, under its own circumstances, does so, in terms, "without positively deciding that there may not, under any circumstances, be an implied easement of light and air."

Kneiper *vs.* Klein, 51 Ind. 316, cited as holding that there can be no such implication, uses language tending to sustain that contention, but is overruled in Ins. Co. *vs.* Patterson, 103 Ind. 582.

Keats *vs.* Hugo, 115 Mass. 204, is to the effect contended for, namely, that there can be no implied easement of light and air. Neither the language of the opinion, its reasoning, nor the facts of the cases to which it applies, render it applicable to any case except those in which easements of light and air only are involved, and, as above noted, Mr. Justice Gray, by whom the opin-

ion of the court was delivered, concurred with all the other justices of this court; in so far as this question is concerned, in the decision arrived at.

Shepherd *vs.* Pepper, 133 U. S. 626, 650.

Even if Keats *vs.* Hugo were to be taken as conclusive of the question which it decides, it would not reach the present case. In Keats *vs.* Hugo, the purchaser knew that he was dependent for light and air upon land not embraced in this deed. In the case at bar, Haller obtained the $75,000 building loan secured by the Warner trust under the inducement held out by him that he would so place his building on the lot as to leave the necessary and essential 10-foot strip on the ground covered by the deed of trust; and the Grayson trust was accepted by the note-holders which it secured, upon the understanding, created by him, that this had been done, and that the 10-foot strip was a part of the Victoria Flats property.

Hutchins *vs.* Munn, 22 D. C. App. 88, has no possible bearing upon the case, for the reason, among others, that there was in that case no common grantor or owner.

To Parker *vs.* Foote, 19 Wend. 309, and the other cases cited to the effect that the doctrine of ancient lights, or of title by prescription to the use of light and air over the land of another, is inapplicable in this country, no reply need be made, for the reason that this case presents no question of that character.

The argument at pages 38–9 of the appellant's brief, that the holders of the notes secured by the deeds of trust should be denied relief because of laches or negligence upon their part, it is submitted, finds no justification in the facts of the case. To hold that it is "culpable carelessness," or want of "reasonable diligence," for the makers of a building loan to trust that the borrower will place the building upon the land upon which he has

given security for the loan, and upon which he has engaged to place it, without following him up with a surveyor to see that he does so, or for persons to take a deed of trust upon a completed building, offered as security for their claims, without having a survey made to ascertain that the building stands wholly within the metes and bounds which the maker specifies in his deed, would impugn at least ninety-nine per cent of the transactions of this character which take place in any community. As will be noted from the facts of the case, there is no claim by the appellants that they are innocent purchasers without notice.

The remaining objection presented by the assignment of errors is to the alternative provision in the decree for sale of the entire property, as a whole, if it is found that it will bring more by a sale in that way than if sold in separate parcels.

The appellees have at no time asked that the two properties should be sold as one, or contended that it was necessary to do more than restore to the Flats building the 10-foot strip taken from it by the appellants under the circumstances heretofore pointed out. A decree in that form, presented by the appellees and printed as an appendix to this brief, was opposed by the learned counsel for the appellants on the ground that, as the court below based its opinion largely upon Shepherd *vs.* Pepper, the logical thing to do was to follow the form of the decree in that case.

With regard to the objection on this ground, presented for the first time in the Court of Appeals, it is to be noted that neither the trustees under the McReynolds trust, nor any holder of the notes thereby secured, have united in this appeal, or made any objection to the decree, either on this or on any other ground. From the standpoint of the appellants themselves, it can hardly be claimed that they have just cause to object

to a form of decree which provides for sale, either as a whole or in parts, as may prove most promotive of the best results and the realization of the highest price. The appellees, however, as stated, have never insisted, nor do they now insist, upon the alternative provision of the decree to this effect, but will be entirely content with a decree in the form presented in the appendix, or in any other form which, in the language of the bill, will constitute "equitable terms with regard to the holders of the promissory notes secured by the deed of trust to McReynolds and Meriwether." As stated, the holders of these notes are entirely satisfied with the decree in its present form.

The claim (at page 40 of appellants' brief) that the trustees to sell were selected over the protest of the appellants, and from Haller's creditors exclusively, is not only not covered by either of the assignments of error, but is wholly unfounded in fact. Warner and McReynolds are not creditors, and no protest was made against their appointment. The protest against Grayson (Rec. p. 132) was in attempted revenge for his having defeated the scheme of the appellants to cut out the second trust note-holders in the faithful discharge of the duties of his trust, for which the court below thought he should be rewarded, rather than punished. The last interview the appellants, had with him, Talbott himself testifies, was a pleasant one (Rec. p. 74). He and his co-trustees were the persons whom Haller himself had selected as trustees in the deeds of trust executed by him.

The objection made below that there is no more reason or justification for arbitrarily fixing the additional strip "at 10 feet than there is for fixing it at 30 feet," is scarcely tenable under the facts of this case. A 10-foot strip was the margin contemplated in the original plan for the building. It was the air space which the material men were given to understand would be laid out outside

the building upon the south and west sides. It is the additional space agreed upon by Haller and Wood as that which should be added at the time of the deed to Duke, at the time of the negotiation for the McReynolds release, and at the time of the contract for the conveyance of the property as a whole to the proposed joint stock company; and it is the smallest space, as shown by the testimony of Mr. Hill, sufficient to relieve the situation.

As above noted, the correctness of the decree appealed from, in so far as the question of easements is concerned, is limited by the assignments of error, as well as by the authorities cited and the discussion presented in the appellants' brief, to the easements of light and air, and, since the other easements allowed by the decree could not exist without carrying with them the light and air also allowed, the discussion as to them would seem to be purely academic, in so far as concerns the case at bar. So long as the 10-foot strip is preserved for the areaways, the cement walk, the approaches to the coal cellars, the porches on every floor of the building, etc., no practical question can arise as to the access of light and air over that strip.

The decree below, certainly in so far as the appeals in Nos. 359 and 439 are concerned, it is respectfully submitted, should be affirmed. Upon the appeal in No. 358, the appellees do not desire to be heard.

J. J. DARLINGTON,
JESSE E. POTBURY,
For Appellees.

APPENDIX.

APPELLEES' DRAFT OF DECREE BELOW.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

DAVID C. GRAYSON ET AL., TRUSTEES, *vs.* FRANK I. WOOD ET AL. } In Equity, No. 20,773.

DECREE.

This cause coming on to be heard upon the pleadings and the evidence, and having been argued by the solicitors for the parties, respectively, and duly considered, it is thereupon by the court, this — day of January, A. D. 1903, adjudged, ordered, and decreed:

That as against the defendants Frank I. Wood, H. Maurice Talbott, and Bernard A. Duke, their heirs and assigns, and as against the defendant, Nicholas T. Haller, his heirs and assigns, other than the defendants, Frederick W. McReynolds and James H. Meriwether, the property covered by the building called the Victoria Flats, together with the overhanging porticoes and other projections on the south and west sides of the said building, and the approaches to the entrances along the said sides of said building into the areas connected therewith, as properly appurtenant to the

same, is subject to the deed of trust from the defendant, Nicholas T. Haller, to the defendants, Brainard H. Warner and Louis D. Wine, trustees, of January 22, 1897, recorded in Liber 2180, at folio 340, of the land records for the District of Columbia, and also to the deed of trust from the said defendant, Nicholas T. Haller, to the complainant David C. Grayson and the defendant, John C. Heald, trustees, of December 20, 1897, recorded in Liber 2291, at folio 133, of said land records, as set forth in the bill.

That as against the defendants Frederick W. McReynolds and James H. Meriwether, trustees under the deed of trust from the said Haller of the 22d day of January, A. D. 1897, described in the bill, and the holders of the promissory notes secured thereby as in said bill set forth, and as against the said Brainard H. Warner and Louis D. Wine, trustees under the deed of trust to them of the 22d day of January, 1897, and as against the holders of the promissory notes secured thereby, and the defendants, Bernard A. Duke, H. Maurice Talbott, and Frank I. Wood, the complainants are entitled to a decree for the sale of the said building, with a strip of land along the west and south sides thereof 10 feet in width, the proceeds thereof to be brought into court, to be disposed of as hereinafter provided.

That Brainard H Warner, Frederick W. McReynolds, and David C. Grayson be, and they hereby are, appointed trustees to make the said sale, and the manner of their proceedings shall be as follows:

They shall first file with the clerk of this court a bond to the United States of America, executed by them with a surety or sureties approved by the court, or by one of the justices thereof, in the penalty of ——— dollars, conditioned for the faithful performance of the trust reposed in them by this decree, or which may be reposed in them by any future order or decree in the premises;

said sale shall be at auction in front of the premises, and the said trustees shall first give notice by publication in the Evening Star newspaper, daily except Sundays and legal holidays, for ten days prior to any sale hereunder, giving notice of the time, place, manner, and terms of any such sale, which terms shall be as follows in respect to such sale by them, as hereinafter provided: One-third of the purchase money in cash, one-third in one year, and one-third in two years, or all cash at the purchaser's option, the deferred payments, if any, to be represented by the promissory notes of the purchaser, bearing date on the day of sale, with interest at the rate of ——— per cent per annum, payable semi-annually, and secured by deed of trust upon the property, or the respective parcels of property to which they relate.

It is further adjudged, ordered, and decreed that, in the distribution of the proceeds of the sale hereby authorized, after payment of the costs of the said sale and of this suit, there shall first be deposited in the registry of the court the sum of six thousand dollars, to be held as a guaranty for the protection of the notes secured by the deed of trust to the defendants McReynolds and Meriwether, and in case the holders of the said promissory notes shall, within a reasonable time after the date of this decree, cause sale to be made of the property described in their said deed of trust, if their notes shall not be paid without such sale, and if the proceeds of such sale shall not be sufficient to pay their said promissory notes in full, then there shall be further applied to their payment, out of the said six thousand dollars, and so far as may be necessary to their full payment, so much of the said six thousand dollars as shall represent the fair and full value of the said 10-foot strip on the south and west sides of the said building, the testimony to ascertain the said value to be taken by the auditor of this court, and his report thereon to be made before any

sale under this decree, this cause being hereby referred to the auditor for this purpose, and the remaining proceeds of the said sale, including such portion of the said six thousand dollars as shall remain after compliance with the foregoing provisions of this decree, shall be applied, first, to the payment of the promissory notes secured by the deed of trust to the defendants Warner and Wine until they are fully satisfied, and then to the payment of the notes secured by the deed of trust to the defendants Grayson and Heald until the same shall be fully paid and satisfied, after which any surplus shall be paid to the defendants Talbott and Wood, their representatives or assigns.

It is further adjudged, ordered, and decreed that the complainants recover of the defendants Frank I. Wood and H. Maurice Talbott their costs in this cause, to be taxed by the clerk, and that the complainants have execution therefor as at law.